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UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

JAN 2 2008

VIA FAX [(202) 639-7890 AND (617) 727-9665] AND U.S. MAIL

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Assistant Attorney General
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RE: Consistency Appeals of Weaver's Cove Energy, LLC and Mill River
Pipeline, LLC

Dear Mr. Kiely and Ms. Iancu:

This letter concerns the Commonwealth of Massachusetts' "Motion to Supplement the Decision Record" (Motion) filed on November 14, 2007. The Motion requests that the Secretary of Commerce include within the decision record to these consistency appeals, a Letter of Recommendation (LOR) issued by the United States Coast Guard (USCG) on October 24, 2007. This Motion is opposed by Weaver's Cove Energy and Mill River Pipeline (Appellants).

I. The Parties' Contentions

Massachusetts' grounds for the Motion are:

- Appellants' proposed Project includes the delivery of liquefied natural gas (LNG) to terminal and pipeline facilities by way of tankers transiting through Mount Hope Bay and the Taunton River. On May 9, 2007, the USCG issued a preliminary assessment in which it found "the waterway [under consideration] may not be suitable for the proposed type and frequency of LNG marine traffic" (Preliminary Assessment). This Preliminary Assessment was part of the consolidated record Appellants submitted to the Secretary of Commerce as part of each consistency appeal;



- On October 24, 2007, the USCG issued its LOR. This letter finalized those views of the USCG originally set forth in the Preliminary Assessment. In this letter, the USCG determined a stretch of the Taunton River is “unsuitable from a navigation safety perspective for the type, size, and frequency of LNG marine traffic associated with [Weaver’s Cove’s] proposal.” The USCG further concluded, “[t]he sum of measures, mitigations and precautions described in the Weaver’s Cove proposal are not sufficient to reduce the risks to a point where the waterway can be declared suitable for the proposed cargo transits.” As a result, “to ensure the safety of the waterway,” the USCG felt “compelled . . . to prohibit the recurrent transit of LNG tankers” along this stretch of the Taunton River. This LOR has been submitted to FERC and is now part of its consolidated record.
- In Massachusetts’ view, the LOR clarifies information in the existing consolidated record. Moreover, the LOR is relevant to this appeal, as it bears on whether the Project furthers the national interest or is necessary in the interest of national security. Accordingly, Massachusetts argues the LOR should be included as supplemental information under 15 C.F.R. §§ 930.127(i)(4) and 930.130(a)(2)(ii)(B). Under regulations implementing the CZMA, the Secretary may supplement the decision record with “any clarifying information submitted by a party to the proceeding related to information in the consolidated record compiled by the lead Federal permitting agency.” 15 C.F.R. § 930.130(a)(2)(ii)(B).

Appellants respond the LOR is not final and is subject to appeal in accordance with USCG regulations. Appellants also claim Massachusetts has made no demonstration that the LOR has any bearing on the issues before the Secretary in this consistency appeal. Appellants contend the LOR was issued pursuant to separate USCG authority with respect to waterway suitability, an issue not before the Secretary.

II. Analysis

Under the CZMA, the consolidated record prepared by the lead Federal permitting agency shall be the initial record used by the Secretary for consistency appeals. 16 U.S.C. § 1466. The Secretary may accept supplemental information into the decision record that clarifies information contained within the consolidated record. 15 C.F.R. § 930.130(a)(2)(ii)(B). The Secretary enjoys wide latitude in determining the content of the appeal decision record. 15 C.F.R. § 930.127(e)(1).

In this instance, inclusion of the USCG’s LOR in the decision record is appropriate. The LOR plainly clarifies information contained in the USCG’s Preliminary Assessment, which is part of the consolidated record submitted by Appellants for purposes of deciding this appeal. Indeed, the LOR would be part of each consolidated record, were both appeals filed today. While the conclusions set forth in this LOR are disputed and on appeal, they do reflect the USCG’s most recent assessment. Failure to include the LOR would inevitably lead to confusion as to the actual views of the USCG on this issue. Accordingly, the Motion is *granted*. The LOR shall in the future be considered part of the decision record for each appeal.


III. Supplemental Briefing Schedule

While the LOR shall be deemed part of the decision record for each appeal, the parties shall be afforded the opportunity to submit briefs addressing its relevance. Specifically, the parties are invited to address the LOR's relevance, if any, to whether: a) the Project furthers the national interest in a significant and substantial manner; and b) whether the national interest furthered by the Project outweighs the Project's adverse coastal effects, when those effects are considered separately or cumulatively. *See* 15 C.F.R. § 930.121(b). The parties shall submit briefs according to the following schedule:

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| January 11, 2008 | The parties shall submit any initial supplemental briefs. Briefs shall not exceed 15 double-spaced pages. |
| January 25, 2008 | The parties shall submit any response supplemental briefs. Response briefs shall address only those arguments raised in the initial supplemental briefs. Briefs shall not exceed 10 double-spaced pages. |

Questions should be directed to Brett Grosko, NOAA Office of General Counsel for Ocean Services, at Brett.Grosko@noaa.gov.

Sincerely,



Jane C. Luxton
General Counsel